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NO. 06-713 and NO. 06-730

IN THE SUPREME COURT OF THE UNITED STATES

WASHINGTON STATE GRANGE,
Petitioner,

v.

WASHINGTON STATE REPUBLICAN PARTY; WASHINGTON STATE DEMOCRATIC CENTRAL COMMITTEE; LIBERTARIAN PARTY OF WASHINGTON STATE; ET AL.,
Respondents.

STATE OF WASHINGTON, ET AL.,
Petitioners,

v.

WASHINGTON STATE REPUBLICAN PARTY; ET AL.,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY OF PETITIONER WASHINGTON STATE GRANGE

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SUMMARY OF ARGUMENT

The political parties do not refute the two specific points dispositive to the Constitutional question presented for review.

First, they do not refute that the free speech protected by our First Amendment includes a person's freedom to utter in public the name of the political party he or she personally prefers.

Second, they do not refute the fact that, *as written*, the text of Washington's top-two statute does nothing more than allow such a personal preference statement to publicly appear on the ballot.

Instead, their arguments are all premised on the notion that an election ballot that looks like the one illustrated below implies that the party designation appearing next to a person's name identifies that person as the named party's candidate, representative, or nominee:

STATE OF WASHINGTON BALLOT

INSTRUCTIONS TO VOTERS:

1. Use a dark pen to fill in the square next to your choice.
2. You may vote for only one candidate for each public office.

PUBLIC OFFICE – GOVERNOR:

- ☐ **Bob Smith** (R)
- ☐ **Jane Doe** (D)

PUBLIC OFFICE – ATTORNEY GENERAL:

- ☐ **Chris R. Jones** (D)
- ☐ **Chris D. Jones** (R)

But the above form of the top-two ballot was never printed.

Nor is it mandated by the statute that the political parties attack.

Instead, Washington's top-two statute allows the ballot to look like either one of the following two examples:

STATE OF WASHINGTON BALLOT

INSTRUCTIONS TO VOTERS:

1. Use a dark pen to fill in the square next to your choice.
2. You may vote for only one candidate for each public office.
3. The political party name shown next to a candidate identifies the party which that candidate listed as being his or her party preference when filing for office. It is not a statement by the political party identifying that candidate as being a party member or being that party's candidate, nominee, or representative in this election.

PUBLIC OFFICE – GOVERNOR:

- ☐ **Bob Smith** (prefers Republican Party)
- ☐ **Jane Doe** (prefers Democratic Party)

PUBLIC OFFICE – ATTORNEY GENERAL:

- ☐ **Chris R. Jones** (prefers Democratic Party)
- ☐ **Chris D. Jones** (prefers Republican Party)

STATE OF WASHINGTON BALLOT

INSTRUCTIONS TO VOTERS:

1. Use a dark pen to fill in the square next to your choice.
2. You may vote for only one candidate for each public office.
3. The political party name shown next to a candidate identifies the party which that candidate listed as being his or her party preference when filing for office. It is not a statement by the political party identifying that candidate as being a party member or being that party's candidate, nominee, or representative in this election.

PUBLIC OFFICE – GOVERNOR:

- ☐ **Bob Smith** (this person's Declaration of Candidacy states: "my party preference is the Republican Party")
- ☐ **Jane Doe** (this person's Declaration of Candidacy states: "my party preference is the Democratic Party")

PUBLIC OFFICE – ATTORNEY GENERAL:

- ☐ **Chris R. Jones** (this person's Declaration of Candidacy states: "my party preference is the Democratic Party")
- ☐ **Chris D. Jones** (this person's Declaration of Candidacy states: "my party preference is the Republican Party")

Washington law, moreover, provides parties ample opportunity to contest the proposed wording of any ballot in court on an expedited basis – ensuring that if a political party objects to the wording of any election ballot under Washington's top-two statute, that objecting party can secure prompt judicial resolution of that objection on an expedited basis.

In short, the hypothetical ballot upon which all of the political parties' arguments are ultimately based (the first example on page 1 above) is not the ballot mandated by the State statute they attack.

Instead, a ballot like the second or third example on pages 2 and 3 above is allowed. And a ballot like either one of those two examples would eliminate the political party's constitutional objection in this case – for either one would dispel the political parties' underlying premise that the ballot voters see under Washington's new top-two statute would imply that a party name appearing on that ballot identifies the corresponding person as that named party's candidate, nominee, or representative.

The reasoning pressed by the political parties' briefing is really a premature *as applied* challenge to the State of Washington's yet-to-be-applied top-two election statute. The lower federal courts' reaching out to preemptively strike down the entirety of this State statute *on its face* (rather than waiting to see if the ballots issued under this statute actually precipitate the Constitutional concerns asserted by the political parties) violated (rather than upheld) core Constitutional principles underlying our nation's form of government.

DISCUSSION

A. The Political Parties Do Not Refute That First Amendment Free Speech Includes The Freedom To Utter In Public The Name Of The Political Party You Personally Prefer.

The political parties do not dispute the First Amendment's broad protection of free speech – especially in the political arena. They accordingly do

not dispute that the free speech protected by our First Amendment includes a person's freedom to utter in public the name of the political party he or she personally prefers.[1]

That makes sense – for this Court has consistently held that the First Amendment protects a broad array of speech that is much more offensive or objectionable than merely uttering generic words like "Democrat" or "Republican".[2] For example, holding that the First Amendment protects:

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[1] As this Court reiterated in the free speech case filed by the (Minnesota) Republicans, speech by persons running for public office "is at the core of our electoral process and of the First Amendment freedoms, not at the edges" – and thus "the notion that the special context of electioneering justifies an *abridgment* of the right to speak out on disputed issues sets our First Amendment jurisprudence on its head. *Republican Party of Minnesota v. White*, 536 U.S. 765, 781-82 (2002) (italics in original). The Ninth Circuit accordingly acknowledged below that every citizen running for office has a fundamental right to express his or her political party preference. Grange Pet. App. 26a.

[2] The Libertarian Party Of Washington State also asserts that it has a trademark right to prevent persons from uttering the word "Libertarian". But that common law or statutory argument does not relate to the Constitutional question accepted for review in this case. It also has no legal merit. For example, trademark law limits the use of trademarks in commercial transactions – it does not ban use in political speech. See, e.g., *Bosley Medical Institute v. Kremer*, 403 F.3d 672, 676-80 (9th Cir. 2005) (permitting non-commercial use of plaintiff's trademark on website criticizing plaintiff's product), *Tax Cap Committee v. Save Our Everglades*, 933 F. Supp. 1077, 1079, 1081-82 (S.D. Fla. 1996) (permitting PAC to use a petition form that closely resembles one developed by a different PAC because the defendant PAC was not using that form for commercial purposes); *Bland v. Fessler*, 88 F.3d 729, 739 (9th Cir. 1996) (commercial speech has less First Amendment protection that political speech). A person stating the name of a political party to identify the party he or she prefers would also fall under trademark law's exception for comparative advertising or nominative use. See, e.g.,

- a person publicly broadcasting pornography over the internet;[3]
- a person publicly accusing a political opponent of "blackmail" or being a "traitor to his God, his country, his family, and his class";[4]
- a person publicly disseminating "virtual" child pornography;[5]
- a person publicly disclosing an illegally taped telephone call about teachers' union negotiations;[6]
- a person publicly distributing a parody of a respected minister having a drunken

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Smith v. Chanel, 402 F.2d 562, 563, 564-69 (9th Cir. 1968) (permitting defendant to advertise his perfume by stating it duplicated 100% the plaintiff's well-known Chanel #5); *Playboy Enterprises v. Welles*, 279 F.3d 796, 799-803 (9th Cir. 2002) (permitting Ms. Wells to use the phrase "Playboy Playmate of the Year 1981" to identify herself on her commercial website because her use of the Playboy Playmate trademark was a nominative use); *New Kids on the Block v. News America*, 971 F.2d 302, 306 (9th Cir. 1992) (permitting comparative use because "it is often virtually impossible to refer to a particular product for purposes of comparison, criticism, point of reference or any other such purpose without using the [allegedly infringed upon] mark"). See generally Appellant Wash. State Grange Ninth Circuit Opening Brief at 20-24 (9th Cir. Docket No. 05-35774) (Sept. 19, 2005); Appellant Wash. State Grange Ninth Circuit Reply Brief at 10-11 (9th Cir. Docket No. 05-35774) (Nov. 8, 2005).

[3] *Reno v. American Civil Liberties Union*, 521 U.S. 844, 882 (1997).

[4] *Greenbelt Cooperative Publishing Assn., Inc. v. Bresler*, 398 U.S. 6, 13 (1970); *Letter Carriers v. Austin*, 418 U.S. 264, 284-286 (1974).

[5] *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 256 (2002).

[6] *Bartnicki v. Vopper*, 532 U.S. 514, 535 (2001).

incestuous bout with his mother in an outhouse.[7]

- a person publicly wearing in a courthouse a jacket stating "FUCK THE DRAFT. STOP THE WAR" – with this Court noting that "one man's vulgarity is another's lyric", and that to forbid particular words invites "a substantial risk of suppressing ideas in the process."[8]

Since the First Amendment protects speech such as the above, there can be no dispute that it also protects a person's freedom to utter in public the name of the political party he or she prefers.[9]

B. The Political Parties Do Not Refute The Fact That, *As Written*, The Text Of Washington's Top-Two Statute Does Nothing More Than Allow Such A Personal Preference Statement To Publicly Appear On The Ballot.

The political parties' briefs do not refute the fact that, *as written*, the text of Washington's top-two statute does nothing more than allow an

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[7] *Hustler Magazine v. Falwell*, 485 U.S. 46, 48, 57 (1988).

[8] *Cohen v. California*, 403 U.S. 15, 25, 26 (1971).

[9] See also *Cantwell v. State of Connecticut*, 310 U.S. 296, 310 (1940) (First Amendment protects not only accurate speech in the political arena, but also exaggeration, vilification, and outright false statements); *Public Disclosure Commission. v. 119 Vote No! Committee*, 957 P.2d 691, 695 (Wash. 1998) (State law cannot prohibit falsity in political debate).

office-seeker's personal preference statement to publicly appear on the ballot.[10]

Nor do they dispute the fact that, unlike the election laws of other States,[11] the text of

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[10] See Brief of Petitioner Washington State Grange at 38-39 (quoting sections 4, 7(3), 9(3), and 12 of Initiative 872 and the Washington Administrative Code provisions promulgated to implement that statute). Indeed, the Washington State Democratic Central Committee's briefing emphasizes the fact that this statute's ballot title stated the party designation on a ballot would be the ***candidate's*** party ***preference***. Brief For Respondent Washington State Democratic Central Committee at 45; accord Appellee State Democratic Central Committee's Ninth Circuit Response Brief at 3:5-7 (9th Cir. Docket No. 05-35774) (Oct. 26, 2005).

[11] See Brief of Petitioner Washington State Grange at 45-46 (explaining the **Connecticut** statute in *Tashjian*, the **Ohio** statute in *Rosen*, the **Georgia** statute in the two *Duke* cases, the invalidated **Washington** law in *Reed*, and the invalidated **California** law in *Jones*). The **New York** statutes at issue in the *Plonski* and *Chambers* cases cited by Respondents were similar, for they expressly stated the party name and emblem on the ballot designated that party's candidates on the ballot. N.Y. Laws, 1954, Ch. 433, §1 ("party shall select a name and emblem to distinguish the candidates of that party for public office ... [and an under 15 letter abbreviation] ... to be used upon the ballot") (version at time of *Plonski v. Flynn*, 222 N.Y.S.2d 542 (1961)); N.Y. Laws, 1922, Ch. 588, §20 (same) (version at time of *Chambers v. Greenman*, 58 N.Y.S.2d 637 (1945)). As this Court's members may also be aware from personal experience, the current election statutes of California, Illinois, New Jersey, New York, Massachusetts, New Hampshire, Maryland, Virginia, and Missouri similarly provide that a party designation on the ballot identifies the corresponding person as that party's nominee. The California, Illinois, New Jersey, and New York statutes require that voters of each party receive a primary ballot only for that party, with the candidates on that party ballot pre-selected by a petition of that party's voters or that party's nominating committee, and the party designation on the subsequent general election ballot showing the party by which that person was nominated in his or her party's primary. Cal. Election Code §§8068, 13110; 8148, 13105; 10 Ill. Comp. Stat. 5/7-10, 5/16-2; N.J. Stat. Ann. §§19.23-5, 19.14-8; N.Y. Election Law §§6-104, 6-110, 7-104. The Massachusetts and New Hampshire statutes provide that a party

Washington's top-two statute does not provide that a party name appearing next to a person's name on the ballot identifies that person as the named party's candidate, representative, or nominee. As the lead Respondent unequivocally admitted in its Ninth Circuit briefing below, ***"No state has a primary system similar to Washington's."***[12]

This statutory fact is fatal to the political parties' *facial* challenge here. As this Court expressly explained in *Jones*, States have broad latitude to allow primary voters to vote for whomever they want – just as long as the State does not couple that free choice with the partisan result of designating the winners of that primary to be the party nominees on the November ballot. 530 U.S. at 572-73 & n.4. Indeed, this Court explained that such a partisan result is the "constitutionally crucial" distinction between a partisan party-nominating primary and a nonpartisan candidate-winnowing primary. 530 U.S. at 585-86.

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designation on the general election ballot reflects nomination by that party at the party primary (or party caucus), and allows only party members (or unaffiliated voters) to vote on a party's primary ballot. Mass. Gen. Laws ch. 53 §§8, 34, 37-38; N.H. Rev. Stat. §§655.21, 656.9. Maryland's statute provides that a party name shall be indicated only on the ballot "of a candidate who is a nominee of a political party." Md. Code, Election Law § 9-210. Virginia's statute provides that a party designation on the ballot must be supported by a letter from "the state chairman of a recognized political party certifying that a candidate is the nominee of that party." Va. Code Ann. §24.2-613. And Missouri's statute establishes a "Montana" style party-nominating primary as noted in the Grange's prior briefing. Mo. Rev. Stat. §115.397.

[12] Appellee Republican Party Ninth Circuit Response to Grange Brief at 15:9 (9th Cir. Docket No. 05-35774) (Oct. 19, 2005) (emphasis added).

As counsel of record for the lead Respondent in this case has candidly acknowledged, a two-stage, candidate-winnowing primary is precisely what the text of Washington's new law enacted.[13] The top-two statute that Washington enacted to comply with this Court's ruling in *Jones* is not unconstitutional on its face because, *as written*, it fully complies with this Court's ruling.[14]

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[13] JA 692 (Initiative 872 "enacted a two-stage election with a 'winnowing' primary under which all candidates who file would appear on the ballot in the first stage, and a run-off between the top two in the second stage"). Accord, Initiative 872, §5 (redefining "primary" as follows: " 'Primary' or 'primary election' means a procedure for winnowing candidates for public office to a final list of two as part of a special or general election") (Grange Pet. App. 118a); Wash. Admin. Code 434-262-012 up until the federal court enjoined I-872 ("Pursuant to Chapter 2, Laws of 2005 [Initiative I-872], a partisan primary does not serve to determine the nominees of a political party but serves to winnow the number of candidates to a final list of two for the general election. The candidate who receives the highest number of votes and the candidate who receives the second highest number of votes at the primary election advance to the general election, regardless of the candidates' political party preference. .... Voters at the primary election are not choosing a political party's nominees.") (Grange Pet. App. 140a).

[14] Despite the political parties' suggestion to the contrary, the fact that Washington specifically drafted a new statute to cure its prior statute's constitutional defect does not render the State's new statute unconstitutional – for States are free to draft new statutes to cure a prior statute's constitutional defect. E.g., *Information Providers Coalition v. FCC*, 928 F.2d 866, 871 (9th Cir. 1991) (upholding new dial-a-porn statute drafted in response to prior version's invalidation); *United States v. Dorsey*, 418 F.3d 1038, 1045 (9th Cir. 2005) (upholding new school-zone-gun statute drafted in response to prior version's invalidation); *Bown v. Gwinnett County School District*, 112 F.3d 1464, 1470 (11th Cir. 1997) (upholding new minute-of-silence statute drafted to say "quiet reflection" after invalidation of prior version saying "silent prayer or meditation").

C. The Theoretical Ballot Envisioned By The Political Parties' *As Applied* Reasoning Is Not Mandated By The State Statute They Attack.

1. Washington's Top-Two Statute Allows The Ballot To Be Clearly Worded To Ensure That It Does Not Imply The Office-Seeker's Personal Preference Statement Is Instead The Party's Designation Of That Person As Its Candidate, Representative, Or Nominee.

The political parties' right-of-association argument has superficial appeal only if one envisions the ballot under Washington's top-two statute as looking like the first example illustrated on page 1 of this Reply Brief. But no such ballot was ever printed, and no such ballot is mandated by Washington's top-two statute.

Washington's top-two statute states that a person running for certain public offices "may indicate a political party preference on his or her declaration of candidacy and have that preference appear on the primary and general election ballot in conjunction with his or her name." Initiative 872, §4 (Grange Pet. App. 117a).[15]

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[15] This statute further requires the candidate to sign the declaration form he or she files "stating that the information provided on the form is true". Initiative 872, §9(5) (Grange Pet. App. 121a); see also the Declaration of Candidacy promulgated by the Secretary of State, which required the following statement of truth to be notarized: "I declare that this information is, to the best of my knowledge, true." (Grange Pet. App. 137a-138a).

What the resulting ballot would actually look like has never been determined because the federal courts enjoined this new State statute's implementation before a single Declaration of Candidacy was filed or a single ballot was prepared for printing.

That is important because the ballot ultimately used under Washington's top-two statute could easily include language that addresses the political parties' concern that a person's statement of his or her personal party preference might be misconstrued to imply an associational tie between that person and the party which that person states he or she prefers.

For example, the top of the ballot could include an explanation that: "The party indication next to a person's name is only an expression of that person's personal preference. It does not indicate that that person is a nominee of that party, that the party prefers that person, or that there is any associational tie whatsoever between that person and the party he or she prefers."

As another example, the ballot could include the following statement next to each person's name: "This person stated when filing to run for this office that he/she prefers the Democratic party. This statement of personal preference does not mean that he/she is a nominee, representative, or candidate of the Democratic party, nor does it mean that he/she is a member of or in any way associated with the Democratic party."

Or, as another example, the ballot could simply be printed to look like either the second or third illustrations on pages 2 and 3 of this Reply Brief.

In short, the ballot under Washington's top-two statute can be worded to avoid the implication of associational ties lying at the heart of the political parties' arguments.

2. Washington Law Also Provides The Political Parties Ample Opportunity To Contest That Wording In Court Before Any Actual Ballot Is Printed Under Washington's Top-Two Statute.

Washington law also provides ample opportunity for prompt judicial review (and revision) of ballot wording if a party believes that the wording proposed for a ballot is not legally sufficiently.

For example, the Washington State Superior Court for Thurston County (the county in which the State Capitol is located) frequently hears challenges to the wording of election ballots, and promptly issues its ruling on (or revision of) that ballot language under the prompt time clock specified by Washington's Ballot Title Statute.[16] Although those

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[16] RCW 29A.72.080 (directing the Thurston County Superior Court to render a decision within five days of the filing of the challenge to proposed ballot wording). The Thurston County Superior Court docket confirms that that court has averaged over nine ballot title challenges a year these past three years. For example, it had at least eleven ballot title challenge suits within just the first four months of 2004: *In re Ballot Title for I-860* (No. 04-2-00096-1) (Jan. 16); *In re Ballot Title for I-864* (No. 04-2-00212-2) (Feb. 3); *In re Ballot Title for I-883* (No. 04-2-

suits have concerned the portion of a ballot relating to initiative or referendum measures (rather than the portion of that ballot relating to public offices), the court's frequent experience with such ballot wording challenges confirms that Washington's State Court system is well equipped to promptly hear and rule upon objections to how an impending election ballot is proposed to be worded.

The political parties in this particular case, moreover, have also confirmed that they are well experienced in securing prompt court rulings on election matters in Washington State – having repeatedly secured expedited next-day trial court rulings and next-week State Supreme Court rulings in their dueling series of challenges to the recount process conducted for Washington's 2004 Gubernatorial election.[17]

00425-7) (Mar. 4); *In re Ballot Title for I-884* (No. 04-2-00544-0) (Mar. 22); *In re Ballot Title for I-885* (No. 04-2-00561-0) (Mar. 23); *In re Ballot Title for I-889* (No. 04-2-00633-1) (Apr. 5); *In re Ballot Title for I-890* (No. 04-2-00669-1) (Apr. 8); *In re Ballot Title for I-891* (No. 04-2-00670-5) (Apr. 8); *In re Ballot Title for I-892* (No. 04-2-00675-6) (Apr. 12); *In re Ballot Title for I-894* (No. 04-2-00782-5) (Apr. 21); *In re Ballot Title for I-895* (No. 04-2-00792-2) (Apr. 22).

[17] Specifically, when the Washington State Republican Party was dissatisfied with the way the machine recount was going to be conducted, it filed an emergency injunction action in federal district court on Saturday evening (Nov. 20), and secured a court hearing that ruled on its injunction request the following Sunday (Nov. 21). Case Docket available electronically, *Republican Party v. King County et al.*, (W.D. Wash. case no. 04-cv-02350 RSM). Then, when the Washington State Democratic Central Committee became dissatisfied with the way the subsequent hand recount was going to be conducted, it filed an emergency action in the Washington Supreme Court on Friday (Dec. 3), secured a Washington Supreme Court hearing on Monday (Dec. 13), and

In short, the political parties' can secure prompt judicial review of the legal sufficiency of whatever wording the State ultimately proposes for the ballot under Washington's top-two statute. But at this point, due to the federal court injunction the political parties secured in this case, no ballot wording has even been proposed – never mind established.

The political parties' reasoning that associational ties might be implied by the wording of the hypothetical ballot they envision makes for interesting theoretical discussion. But it does not present an actual ballot that is ripe for judicial review. The political parties' *as applied* reasoning for why Washington's top-two statute must be declared invalid in its entirety is at this point utterly premature.

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received the Supreme Court's ruling on Tuesday (Dec. 14). *McDonald et al. v. Reed et al.*, 103 P.3d 722 (Wash. 2004) and case docket no. 763216. Then, when the Washington State Republican Party became dissatisfied with a different aspect of the way that hand recount was going to proceed, it filed an emergency injunction action in Pierce County Superior Court on Thursday (Dec. 16), secured a hearing granting that injunction on Friday (Dec. 17), which the Washington State Supreme Court then promptly heard on appeal and resolved with a ruling on Wednesday (Dec. 22). *Republican Party v. King County et al.*, 103 P.3d 725 (Wash. 2004) and case docket no. 763992.

3. The Federal Courts' Reaching Out To Preemptively Strike Down This State Statute *On Its Face* (Rather Than Waiting To See What The Ballot Actually Looks Like When The State *Applies* This New State Statute) Violated Our Federal Constitution's Core Principles.

This Court has historically been reluctant to entertain *facial* attacks on statutes (i.e., claims that a statute is invalid in all of its applications), instead normally proceeding to determine whether a law is unconstitutional *as applied* in the particular case before the Court.[18]

This well established principle of requiring parties to present their concerns in a concrete *as applied* challenge rather than a speculative *facial* challenge is illustrated by two of this Court's decisions relating to the McCain-Feingold campaign finance law.

This Court's first decision rejected a series of constitutional challenges noting that they should be presented in *as applied* cases based on actual facts

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[18] See, e.g., *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 501-503 (1985); *United States v. Grace*, 461 U.S. 171, 175 (1983); *Nixon v. Administrator of General Services*, 433 U.S. 425, 438-39 (1977); *Joseph E. Seagram & Sons, Inc. v. Hostetter*, 384 U.S. 35, 52 (1966); *United States v. Raines*, 362 U.S. 17, 20-24 (1960); and *Watson v. Buck*, 313 U.S. 387, 402 (1941) (cited in *City of Lakewood v. Plain Dealer Pub. Co.*, 486 U.S. 750, 774-75 (1988) (White, J., Stevens, J. and O'Connor, J. dissenting). That is in large measure due to the fact that a facial challenge requires a showing that the challenged statue is "invalid in toto – and therefore incapable of any valid application." *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 494 n.5 (1982) (emphasis added).

rather than in a *facial* challenge based on hypotheticals and speculation. This Court accordingly:

- rejected a claim that the interaction between federal and state laws would result in the federal act's soft-money prohibition being overbroad, because the interaction between federal and state laws was better addressed in an "as applied challenge";[19]
- rejected as speculative a claim that the act interfered with speech and associational rights of minor parties, because "a nascent or struggling minor party can bring an as applied challenge" if the federal act interfered with its ability to advocate effectively;[20]
- rejected a claim that the act's reduction in funds might "drive the sound of the recipient's voice below the level of notice", because such a claim could be raised in an as applied challenge if it actually occurred;[21] and
- rejected a claim that the act's disclosure obligations interfered with associational rights, because those concerns could be adequately addressed in an as applied challenge if interference actually occurred.[22]

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[19] *McConnell v. FEC*, 540 U.S. 93, 157 & n.52 (2003).

[20] *McConnell*, 540 U.S. at 158-59.

[21] *McConnell*, 540 U.S. at 173.

[22] *McConnell*, 540 U.S. at 197-200.

In contrast, three years later this Court addressed (and ruled on) a properly presented *as applied* challenge to that McCain-Feingold act. *FEC v. Wisconsin Right to Life*, 127 S. Ct. 2652, 2670 (2007).

Although the political parties make light of the Grange's emphasis on core Constitutional principles, such as separation of powers and federalism, the political parties' briefs do not refute the significance of those core principals in this case. Nor do they refute the reasoned judicial restraint that necessarily flows from those core principles (e.g., avoiding constructions of a statute that would render it unconstitutional, and invalidating only that portion of a statute that must be invalidated to prevent it from being stricken down in its entirety).

These core Constitutional principles underlying the federal judicial branch's respect for the legislative branch and the flexibility granted to each of the individual States similarly require that if this Court is to invalidate a State statute, it should do so based on actual facts presented in an *as applied* challenge instead of hypothetical facts imagined in a *facial* challenge. Indeed, this Court has long held that ruling on the constitutionality of legislation "is not to be exercised with reference to hypothetical cases thus imagined." *United States v. Raines*, 362 U.S. 17, 22 (1960); see also *Nixon v. Admin. of General Services*, 433 U.S. 425, 466 (1977) (rejecting a facial challenge to a statute based on associational rights prior to promulgation of administrative regulations that could adequately protect those rights, and noting that "there [is] no reason to believe that the mandated regulations

when promulgated would not adequate protect" those rights).

In this case, the State statute *as written* fully complies with this Court's ruling in *Jones*. The federal courts' reaching out to preemptively strike down this State statute *on its face* (instead of waiting to see what any ballot actually looks like when the State *applies* this new State statute) violated (rather than upheld) our federal Constitution's core principles.

CONCLUSION

In *California Democratic Party v. Jones*, 530 U.S. 567, 585-586 (2000), this Court explained that States are free to adopt an open, top-two primary system as long as that system does not specify the partisan result of selecting the political parties' candidate, representative, or nominee.

The people of the State of Washington took this Court at its word and overwhelmingly enacted such a State statute. A new statute that, as counsel of record for the lead Respondent in this case has explained, "enacted a two-stage election with a 'winnowing' primary under which all candidates who file would appear on the ballot in the first stage, and a run-off between the top two in the second stage." Supra footnote 13.

The fact that no other States have (yet) replaced their traditional party-nominating primary system with such a top-two winnowing system does not make Washington's new, non-traditional system

unconstitutional – for our federal Constitution protects (rather than prohibits) the freedom of each State's citizens to adopt new and novel systems different from those of their peers.

Nor does the fact that a single (severable) part of Washington's statute allowing an office-seeker to publicly disclose the name of the party he or she personally prefers transform Washington's otherwise constitutional top-two statute into an entirely unconstitutional one. Our First Amendment does not prohibit a State from allowing a person running for public office to disclose the name of the party he or she personally prefers on the ballot – especially if that ballot looks like the second or third examples illustrated on pages 2 and 3 of this Reply Brief.

The Washington State Grange, the sponsor of the top-two statute at issue in this case, therefore respectfully requests that this Court reverse the Ninth Circuit judgment striking down Washington's top-two statute in its entirety.

RESPECTFULLY SUBMITTED.

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